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5 IN THE UNITED STATES DISTRICT COURT

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9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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ADRIAN JOHN, SR., *et al.*,

No. C 16-02368 WHA

Petitioners,

v.

12 AGUSTIN GARCIA, *et al.*,

**ORDER GRANTING
MOTION TO DISMISS**

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Respondents.

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INTRODUCTION

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Respondents move for the third time to dismiss this petition for writ of habeas corpus pursuant to the Indian Civil Rights Act. The motion is **GRANTED**.

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STATEMENT

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The parties herein belong to the Elem Indian Colony of Pomo Indians (the “Tribe”). A general council comprising all qualified voting members governs the Tribe and delegates various powers to a biennially-elected executive committee. Following a disputed election in November 2014, two factions — petitioners and respondents — each purported to be the Tribe’s duly-elected executive committee. Respondents managed to establish themselves as such and remain in power as the current executive committee, though petitioners continued to contest the results of the 2014 election.

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On March 28, 2016, respondents issued an “Order of Disenrollment” to petitioners and other members of the Tribe. The disenrollment order accused petitioners of “violating the laws of Elem” and included a list of offenses. It stated, “If you are found guilty by the General

1 Council of these offenses against the Tribe, you may be punished by . . . DISENROLLMENT
2 — loss of membership.” Recipients of the disenrollment order could submit a written answer
3 within 35 days admitting or denying each accusation (Dkt. No. 30-1 at 12).

4 The disenrollment order issued pursuant to Tribal ordinance number GCORD08412,
5 “Ordinance Establishing the Tribal Sanctions Of Disenfranchisement, Banishment, Revenue
6 Forfeiture, and Disenrollment And the Process for Imposing Them,” and pursuant to powers
7 delegated to the executive committee by general council resolution number GC80412. In
8 relevant part, the sanctions ordinance defined “disenrollment” as (Dkt. No. 30-1 at 4):

9 The penalty by which a member of Elem is permanently removed
10 from the membership roll of Elem for all purposes. . . .
11 Disenrollment may only be imposed by the General Council
12 pursuant to this Ordinance, and only if the member . . . [i]s
13 expressly found by the General Council to warrant Banishment
14 pursuant to this Ordinance, but the General Council specifically
finds that Banishment is inadequate to protect the members,
resources, or sovereignty of Elem from the behavior of the accused
Tribal member under the specific circumstances of that person’s
case. Disenrollment of an individual for these reasons shall only
be used as a last resort.

15 The sanctions ordinance defined “banishment” as (*id.* at 3):

16 The penalty by which a member of Elem is banished from Elem,
17 after which the banished person may no longer obtain any of the
18 benefits of membership in Elem, attend Elem meetings, or enter,
possess, or use for any purpose any property held in trust by the
19 United States for Elem or otherwise belonging to or occupied by
Elem. Banishment shall only be imposed pursuant to this
20 Ordinance if the General Council specifically finds that the
offenses committed and the injuries caused to Elem and its
members are of the worst nature, and that the subject person
cannot be rehabilitated.

21 Shortly after issuance of the disenrollment order, on April 30, 2016, petitioners filed this
22 petition for writ of habeas corpus, alleging denial of due process and equal protection in
23 violation of the Indian Civil Rights Act. Respondents moved to dismiss the original petition.
24 From the start, the parties disagreed on numerous key points of fact, including whether or not
25 petitioners had actually been disenrolled and whether or not they timely answered the
26 disenrollment order. During oral argument on that first motion to dismiss, counsel for
27 petitioners presented evidence that contradicted representations made by counsel for
28 respondents on both fronts (*see* Dkt. No. 28 at 15:11–23:21, 28:5–16).

1 It also came out during that hearing that on June 2, 2016, respondents had issued a
2 “Disenrollment Notice of Default,” which claimed that petitioners’ time to answer the
3 disenrollment order had passed. Petitioners and other recipients of the order were thus deemed
4 to be in default and to have admitted the allegations against them. The notice of default
5 specifically stated, “You are therefore found guilty of the offenses against the Tribe charged
6 against you in the Complaint and your punishment for those offenses is . . . **Loss of**
7 **Membership:** Disenrolled from the Elem Indian Colony as of June 2, 2016” (e.g., Dkt. No. 14-
8 1 at 5 (bold and underline in original)). In light of this contested, apparently unreliable, and
9 still-evolving record, the undersigned judge granted petitioners leave to file an amended petition
10 in lieu of ruling on respondents’ first motion to dismiss (Dkt. No. 28 at 28:17–29:15).

11 Petitioners then filed an amended petition, and respondents again moved to dismiss
12 (Dkt. No. 35). An order after the hearing on respondents’ second motion to dismiss explained
13 (Dkt. No. 50):

14 Contrary to the plain text of the disenrollment order and notice of
15 default, however, counsel and the current Tribal Chair for
16 respondents represented at the hearing on their motion to dismiss
17 today that not a single petitioner is currently disenrolled.
18 Moreover, counsel and the Tribal Chair represented that the
19 disenrollment order and notice of default are ineffective and, for all
20 intents and purposes, dead letters; that no petitioner needs to do
21 anything, including appear before the general council, in response
22 to either document; and that no disenrollment proceedings are
23 currently underway or pending against any petitioner. In short,
24 respondents have unequivocally conceded away the entire
25 disenrollment issue, and all collateral consequences thereof —
including the prospect of permanent banishment that is the crux of
this petition — have apparently evaporated.

26 The Court is thus inclined to dismiss this petition. The volatility of
27 relations between the two sides, however, is such that the potential
28 need for relief in the near future remains a real possibility. This
action, moreover, has been plagued by evolving and shifting facts
and narratives, and testimony elicited during the hearing today
suggests some effects of respondents’ now-repudiated actions —
such as the denial of medical services to petitioners based on their
purported “disenrollment” — continue to reverberate.

26 Accordingly, this order **DEFERS** ruling on respondents’ pending
27 motion to dismiss. A further hearing on this matter is set for
28 **MARCH 16**. In the meantime, petitioners shall issue subpoenas and
take depositions as needed to discover evidence, if any, of the
practical effects of respondents’ disenrollment order and notice of
default on petitioners.

1 Before the follow-up hearing could take place, however, proceedings were stayed at the parties'
2 request pending mediation before Judge Nandor Vadas.

3 During the stay, petitioners submitted a bolus of disorganized materials, including
4 deposition transcripts, exhibits, and various other documents, in a single combined filing titled
5 "Supplemental Materials and Request for Discovery" (Dkt. No. 60). Another order denied the
6 request for discovery, stating (Dkt. No. 65 (italics in original)):

7 Statements in passive tense like "Ms. Steele was recently denied
8 use of the Elem PRC Program because she was deemed ineligible"
9 and "Ms. Steele was informed that she was not eligible for the
10 Elem PRC Program" beg key questions like *who* denied her use of
11 the program and informed her that she was ineligible (*see id.* at 5).
Even the declaration itself suffers from the same defects, setting
forth unhelpful statements like "I was told that these expenses
needed to be reimbursed directly by the Tribe" and "I was denied
access [to a tribal meeting]" (*see id.* at 99, 101).

12 It is unfair to the judge to make these non-specific statements, with
13 citations to similarly non-specific declarations buried in a
14 hundred-page-plus combined document, and expect the judge to
15 surmise factual details that should be plainly set forth in
16 petitioners' request. The Court is not convinced at this time that
further discovery is warranted. Petitioners' request is therefore
DENIED without prejudice to their renewing it at a later time. If
the request is renewed, however, it should be written in active
voice and should clearly set forth complete and accurate citations
to supporting evidence.

17 Petitioners never renewed their request for discovery.

18 Prior orders extended the stay several times to give the parties every opportunity to
19 resolve their differences in mediation until, with Judge Vadas's retirement approaching, another
20 order finally put an end to the stay and required respondents to renew their motion to dismiss
21 (Dkt. No. 71). Respondents then filed the instant motion (Dkt. No. 74). This third motion to
22 dismiss, like its predecessors, has been fully briefed. The Court also requested and received an
23 amicus brief from the United States on the issue of subject-matter jurisdiction. Both sides have
24 had an opportunity to respond to the amicus brief. In light of the foregoing history, no further
25 hearing is necessary to decide this motion.

26 ANALYSIS

27 Respondents' renewed motion to dismiss repeats their position that petitioners have not
28 been and will not be disenrolled or banished in the foreseeable future. It appends a letter dated

1 March 31, 2017, from respondent Tribal Chairman Agustin Garcia to petitioner Adrian John,
2 regarding the disenrollment order. The letter states (Dkt. No. 74-1 at 6):

3 In the interest of working towards the healing of our internal Tribal
4 difficulties, the Elem Executive Committee has withdrawn that
5 complaint (and all others against Elem members) and has resolved
6 to take no action whatsoever towards disenrolling you or any other
7 Tribal member. No Elem member has been disenrolled and no
8 process is underway to disenroll any member.

9 We hope to work with all Tribal members to amend our Tribal
10 Constitution by Secretarial Election as soon as possible to ensure
11 that disenrollment is not available as a Tribal punishment as well
12 as making other changes for the benefit of ALL Tribal members.

13 The evidentiary record otherwise remains substantially unchanged since respondents' second
14 motion to dismiss.

15 Based on the premise that no petitioner has been disenrolled or banished, or will be
16 disenrolled or banished in the foreseeable future, respondents contend this petition must be
17 dismissed for lack of subject-matter jurisdiction because it remains (1) unripe, (2) barred by
tribal sovereign immunity, and (3) "a purely intra-Tribal dispute that should not be heard by this
Court" (Dkt. No. 74 at 5). Their main thesis seems to be that petitioners cannot establish
subject-matter jurisdiction under the ICRA because they failed to establish the requisite custody
or detention for seeking such relief. This order must agree.

18 The ICRA provides, "The privilege of the writ of habeas corpus shall be available to any
19 person, in a court of the United States, to test the legality of his detention by order of an Indian
20 tribe." 25 U.S.C. § 1303. Our court of appeals has described two jurisdictional prerequisites
21 for a petition for writ of habeas corpus under Section 1303. *First*, the petitioner must be in
22 custody or detained. *Second*, the petitioner must exhaust tribal remedies before filing a petition.
Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010). The instant petition fails to satisfy the
23 first jurisdictional prerequisite to show custody or detention.

24 Invocation of Section 1303 requires "a severe actual or potential restraint on liberty."
25 *Id.* at 919 (citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir.
26 1996)). Petitioners' theory is essentially that, according to the sanctions ordinance, banishment
27 is a lesser included penalty of disenrollment. Thus, they reason, they were necessarily banished

1 from the Tribe by the notice of default informing them of their supposed disenrollment (*e.g.*,
2 Dkt. No. 30 at 8–9). Additionally, petitioners claim they remain “subject to physical removal”
3 at any time because their disenrollment makes them “trespassers” on the Tribe’s land. And,
4 disenrollment would exclude petitioners from “culturally significant areas on the Reservation”
5 like roundhouses and burial grounds. These effects, petitioners allege, amount to a “severe
6 restraint” that permits invocation of Section 1303 (*see id.* at 10–14).

7 *Jeffredo* remains closest to a controlling decision on point. There, an Indian tribe
8 disenrolled several members for failing to prove their lineal descent. The members then
9 brought a petition for writ of habeas corpus under Section 1303, claiming, as petitioners do
10 here, that their disenrollment amounted to unlawful detention. 599 F.3d at 915–17. Our court
11 of appeals rejected the petitioners’ argument, noting that, under the tribe’s laws, disenrollment
12 was not tantamount to banishment. *Id.* at 916. Moreover, our court of appeals concluded that
13 “denial of access to certain facilities,” including the tribe’s health clinic and school, did not
14 “pose a severe actual or potential restraint on . . . liberty” given that the petitioners were never
15 arrested, imprisoned, fined, “or otherwise held by the Tribe,” nor had they been evicted or
16 “suffered destruction of their property.” *Id.* at 919. Furthermore, “potential threat of future
17 eviction is not sufficient to satisfy the detention requirement of [Section] 1303.” *Id.* at 920.

18 Similarly, petitioners’ allegations here show no “severe restraint” that would permit
19 invocation of Section 1303. Petitioners repeatedly claim in vague terms that unspecified
20 persons denied them access to facilities or services, precluded them from political or cultural
21 forums in the Tribe, and prevented them from collecting shares of the Tribe’s revenue (*see, e.g.*,
22 Dkt. No. 30 ¶¶ 13–25). Under *Jeffredo*, these restrictions do not suffice to trigger Section 1303.
23 *See* 599 F.3d at 919. Petitioners also argue that, pursuant to the sanctions ordinance,
24 disenrollment necessarily entails banishment, which in turn entails eviction. Thus, petitioners
25 reason, they remain under threat of eviction that — despite the lack of any *actual* banishment or
26 eviction — qualifies as a “severe restraint” for Section 1303 purposes (*see* Dkt. No. 30 ¶¶
27 26–59, 81–92, Prayer for Relief). But *Jeffredo* specifically rejected the notion that “potential
28 threat of future eviction” suffices to trigger Section 1303. 599 F.3d at 920.

1 It has become clear, moreover, that whatever threat there may have been in the
2 disenrollment order and notice of default has been withdrawn and disavowed over the course of
3 this litigation. Petitioners devote a substantial section of their opposition to the instant motion
4 to flyspecking the authenticity of respondents' letter dated March 31, 2017 (Dkt. No. 76 at 4–8),
5 but this nitpicking misses the point. As petitioners even acknowledge, that letter was only the
6 latest iteration of a recurring theme. The record in this matter has become saturated with
7 respondents' multiple unequivocal representations, including representations made in person
8 before the Court, that no threat of disenrollment or banishment looms over petitioners.
9 Understandably, petitioners may still distrust respondents' intentions, but the fact remains that
10 respondents have, on the record, neutralized any threat that may have been posed to petitioners
11 by the disenrollment order or notice of default. Given that those documents formed the
12 backbone of petitioners' arguments that they have been "detained," even if petitioners had a
13 colorable argument at the outset that either document posed a sufficiently dire threat to invoke
14 Section 1303, they no longer have any such argument at this point.

15 Petitioners continue to rely on *Poodry* as their best legal authority on point (*see* Dkt. No.
16 76 at 10–12). In *Poodry*, an Indian tribe disenrolled and permanently banished certain members
17 using orders that read in part, "You are to leave now and never return. . . . YOU MUST
18 LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS
19 OF OUR TERRITORY." 85 F.3d at 878. After a failed initial attempt to take the petitioners
20 into custody and eject them from the reservation, the respondents in *Poodry* harassed and
21 physically assaulted the banished members and their families, including by stoning them and
22 cutting off their access to electricity and healthcare. The respondents also appealed to state and
23 federal government officials for assistance in removing the banished members from the
24 reservation. *Id.* at 878–79. Under those circumstances, the Second Circuit held that a penalty
25 of permanent banishment could suffice to trigger Section 1303, and indeed did so given those
26 facts. *Id.* at 879–80.

27 Petitioners have not alleged any facts remotely like those present in *Poodry*. Petitioners
28 have not been removed from their homes or the Tribe's land. They have not been assaulted or

1 threatened with eviction efforts involving government officials. As explained, they have not
2 even been disenrolled or permanently banished (or, at least, any disenrollment or banishment
3 that may have taken place has since been totally withdrawn and disavowed). Their claim to
4 relief under Section 1303 remains predicated on their own perception that two documents, both
5 now dead letters, rendered them “trespassers,” and their insistence that respondents generally
6 cannot be trusted to not “detain” petitioners in the future. In short, on these facts, *Jeffredo*
7 clearly remains the best authority on point and requires dismissal of the petition.

8 Petitioners also attempt to rely on *Tavares v. Whitehouse*, 851 F.3d 863 (9th Cir. 2017),
9 a recent decision by our court of appeals, for the proposition that permanent banishment
10 constitutes a “severe restraint” for Section 1303 purposes (*see* Dkt. No. 76 at 13). *Tavares*,
11 which actually affirmed a dismissal of a petition for writ of habeas corpus that challenged an
12 order temporarily excluding tribe members from tribal land (but not the entire reservation), did
13 not set forth any “bar” like that articulated by petitioners. *See* 851 F.3d at 868. Petitioners’
14 theory seems to be that *Tavares* said “[a] temporary exclusion is not tantamount to a detention,”
15 *id.* at 877, so by inference, a permanent exclusion — like permanent banishment — must
16 qualify as a “detention” sufficient to trigger Section 1303 (*see* Dkt. No. 76 at 13). This is a non
17 sequitur. But even assuming for the sake of argument that petitioners’ tortured reading of
18 *Tavares* was accurate, it would not help their cause here because, as explained, petitioners have
19 not been permanently banished or excluded from the Tribe. Again, *Jeffredo* remains the best
20 authority on point and requires dismissal of the petition.

21 Petitioners attempt to distinguish *Jeffredo* on the bases that (1) their supposed
22 disenrollment occurred pursuant to a criminal sanctions ordinance, not an enrollment ordinance;
23 (2) the petitioners in *Jeffredo* had more due process than petitioners did here; and (3) here,
24 unlike in *Jeffredo*, disenrollment necessarily entails banishment, which in turn entails the threat
25 of eviction (Dkt. No. 76 at 14–15). Each of petitioners’ arguments turns on a distinction
26 without a difference. Even *Poodry*, petitioners’ best legal authority, recognized that imposition
27 of a criminal sanction is not by itself sufficient to trigger Section 1303. 85 F.3d at 879. The
28 decision of our court of appeals in *Jeffredo* did not turn on the level of due process afforded to

1 the petitioners there. And, as explained, petitioners here have not shown that they remain under
2 any threat of disenrollment, banishment, or eviction, let alone any threat amounting to a “severe
3 restraint” sufficient to invoke Section 1303.

4 The true theme of this petition seems to be that petitioners feel their membership in the
5 Tribe remains at risk, essentially because their political rivals remain in power and have, at
6 minimum, expressed some desire to threaten petitioners with exclusion from the Tribe, if not to
7 outright exclude petitioners at some point and under some pretext or another. This order in no
8 way minimizes the seriousness of these political disputes and their impacts on the lives of the
9 Tribe's individual members. No amount of attorney rhetoric, however, can coalesce the general
10 history and atmosphere of hostility and distrust between the Tribe's rival factions into a "severe
11 restraint" such that one faction may petition for writ of habeas corpus under Section 1303.

12 Since petitioners failed to establish the requisite custody or detention for seeking relief
13 via a petition for writ of habeas corpus under Section 1303, this petition must be dismissed.
14 Petitioners have not requested further leave to amend, and such leave would not be warranted in
15 any event in light of the multiple opportunities already granted for petitioners to cure the
16 deficiencies in their petition, including by taking discovery. Because this order concludes
17 petitioners have not shown a “severe restraint” sufficient to invoke Section 1303, it does not
18 reach the parties’ additional arguments, including arguments regarding exhaustion of
19 administrative remedies or sovereign immunity.

CONCLUSION

21 For the foregoing reasons, respondents' motion to dismiss is **GRANTED**. This petition is
22 **DISMISSED**. The Clerk shall please **CLOSE THE FILE**.

24 || IT IS SO ORDERED.

26 || Dated: March 31, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE